

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDWARD MOCK

Claimant

VS.

CITY OF SALINA

Respondent

Self-Insured

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Docket No. 265,035

ORDER

Claimant appeals the May 8, 2002 Award of Administrative Law Judge Bruce E. Moore. Claimant was denied benefits after the Administrative Law Judge found claimant had failed to prove that he suffered accidental injury arising out of and in the course of his employment on the dates alleged and had further failed to provide timely notice of accident. The Appeals Board (Board) held oral argument on November 6, 2002.

APPEARANCES

Claimant appeared by his attorney, Scott M. Price of Salina, Kansas. Respondent, a self-insured, appeared by its attorney, Mickey W. Mosier of Salina, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment on the dates alleged?
- (2) Did claimant provide timely notice of accident as required by K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Award of the Administrative Law Judge should be reversed with regard to the issue of notice, but affirmed with regard to whether claimant suffered accidental injury arising out of and in the course of his employment.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own insofar as they do not contradict the findings and conclusions set forth below.

Claimant, a maintenance employee for respondent, began developing right shoulder problems during the winter of 2000-2001. He was referred to Milo G. Sloo, III, M.D., a board certified orthopedic surgeon, and diagnosed with a torn rotator cuff. Surgery was performed on March 20, 2001, with a follow-up surgery on June 12, 2001, to the right shoulder. After a period of follow-up care, claimant was released with restrictions to perform no overhead work. Claimant has returned to work for respondent at the same job he was performing at the time of the accident.

Claimant was referred for an evaluation and examination to Pedro A. Murati, M.D., a board certified physiatrist, by his attorney. Dr. Murati diagnosed right shoulder pain status post acromioplasty with rotator cuff repair and arthroplasty with lysis of adhesions. He further diagnosed left shoulder pain secondary to rotator cuff strain versus tear. He found claimant had suffered a 26 percent impairment to the right upper extremity, which converts to a 16 percent whole person impairment. He assessed claimant a 6 percent upper extremity impairment for the left shoulder, which converts to a 4 percent whole person impairment. These combine for a 19 percent whole person impairment pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dr. Murati's examination is significant in that the history of injury provided to him is different than that provided to Dr. Sloo and different than that to which claimant testified. Dr. Murati's history indicated that claimant suffered a traumatic injury when he lifted a mower which weighed between 80 and 200 pounds. This injury was to both shoulders. His history also shows a worsening of the left shoulder after restrictions were placed on the right. Dr. Murati went on to testify that rotator cuff tears come from a single traumatic incident. He also testified that rotator cuff tears do not come from aging but generally just from trauma. He acknowledged the use of a shoulder would create a higher risk of developing a tear, but nevertheless attributed claimant's problems to the single traumatic incident. This single traumatic incident history from Dr. Murati is contrary to anything testified to by claimant or anything provided to Dr. Sloo. As such, both the Administrative Law Judge and the Board discount Dr. Murati's testimony in this matter.

Claimant testified that when he began having problems, he had a conversation with Sandra Wilcox, the benefits coordinator for the City of Salina. Ms. Wilcox acknowledged that her duties included the administration of workers' compensation claims. She also acknowledged that claimant approached her in late February or early March 2001 regarding problems with his right shoulder which he felt might be, in some way, related to the lifting at work. As he was unable to pinpoint a specific incident, she did not allow him, at that time, to complete a workers' compensation form.

K.S.A. 44-520 requires notice of accident be provided to an employer within ten days of the date of accident. This notice must state the time, place and particulars connected to the accident.

The Board finds that claimant's conversation with Ms. Wilcox was sufficiently specific to notify respondent that claimant was alleging some type of repetitive trauma accidental injury. The Board, therefore, finds that claimant did provide notice of accident within ten days of the March 20, 2001 ending date of the alleged accident. The Award of the Administrative Law Judge in this regard is reversed.

Claimant must, however, also prove that he did suffer an accidental injury arising out of and in the course of his employment. As noted above, the history provided Dr. Murati is inconsistent with anything contained anywhere else in the record with regard to the sudden onset of injury. The history provided to Dr. Sloo was more consistent with claimant's testimony in that claimant's shoulder problems developed over a long period of time without any specific traumatic injury. Dr. Sloo testified that he saw no evidence in either the history or the findings that would indicate claimant suffered a specific injury, work related or otherwise. And while he did testify that claimant's kind of work could have exacerbated or exaggerated claimant's shoulder problems, he did not state within a reasonable degree of medical probability that this actually occurred.

Under K.S.A. 44-501 and K.S.A. 44-508(g), it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. The Board finds, as did the Administrative Law Judge, that claimant has failed to prove that his ongoing problems with his shoulders are the result of an accidental injury arising out of and in the course of his employment. Therefore, the Board finds the denial of benefits in this case to be appropriate and the Administrative Law Judge's Award in that regard is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated May 8, 2002, should be, and is hereby, reversed, in part, and affirmed, in part, and claimant, Edward Mock, is denied an

award against respondent, the City of Salina, for his alleged injuries suffered through March 20, 2001.

IT IS SO ORDERED.

Dated this ____ day of December 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott M. Price, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation